

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JAY KLEINER,

Plaintiff,

v.

Vons,

Defendant.

2:08-CV-01712-LRH-PAL

ORDER

Before the court is Defendant Vons' Motion to Dismiss (#11<sup>1</sup>). In response, Plaintiff Jay Kleiner filed a "Motion to Omit Defendant's Motion" (#16) to which Vons replied (#17).<sup>2</sup>

This is an employment discrimination dispute arising out of Kleiner's employment as a manager for Vons. On October 2, 2007, Plaintiff filed a charge of discrimination with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission ("EEOC"), alleging that Vons discriminated against him on the basis of his disability. In particular he alleged he was not afforded a reasonable accommodation for his disability and was discharged because he is disabled. On September 15, 2008, the EEOC closed Plaintiff's charge and issued Plaintiff a right to sue letter informing him that he had ninety days to file suit.

On December 5, 2008, Plaintiff filed a complaint and an application to proceed in forma pauperis (#1). On January 26, 2009, the court denied Plaintiff's application without prejudice

<sup>1</sup>Refers to the court's docket entry number.

<sup>2</sup>Despite Plaintiff's characterization of his brief as a "motion," the brief is in fact a response to the motion to dismiss, and the court will construe it as such.

1 because the application was incomplete (#2). The court gave Plaintiff thirty days to file a  
2 complete application. On February 2, 2009, Plaintiff filed a second application to proceed in  
3 forma pauperis (#3), which the court granted on June 8, 2009 (#4). At that time the court  
4 directed the clerk to file the complaint (#5).

5 Vons appears to seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). To  
6 survive a motion to dismiss for failure to state a claim, a complaint must satisfy the Federal Rule  
7 of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med.*  
8 *Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short and plain  
9 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The  
10 Rule 8(a)(2) pleading standard does not require detailed factual allegations; however, a pleading  
11 that offers only “labels and conclusions” or “a formulaic recitation of the elements of a cause of  
12 action” will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic*  
13 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

14 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
15 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 1949 (internal  
16 quotation marks omitted). A claim has facial plausibility when the pleaded factual content  
17 allows the court to draw the reasonable inference, based on the court’s judicial experience and  
18 common sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The  
19 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer  
20 possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely  
21 consistent with a defendant’s liability, it stops short of the line between possibility and  
22 plausibility of entitlement to relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

23 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
24 true. *Id.* (citation omitted). However, “bare assertions . . . amount[ing] to nothing more than a  
25 formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth.”  
26 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (*quoting Iqbal*, 129 S. Ct. at 1951)  
27 (alteration in original) (internal quotation marks omitted). The court discounts these allegations  
28 because they do “nothing more than state a legal conclusion – even if that conclusion is cast in

1 the form of a factual allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint  
2 to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences  
3 from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*  
4 (quoting *Iqbal*, 129 S. Ct. at 1949)

5 Vons argues dismissal of Plaintiff’s complaint is warranted because Plaintiff’s claim is  
6 time-barred by 42 U.S.C. § 2000e-5(f)(1). Although § 2000e-5 is a provision of Title VII, it also  
7 applies to claims alleging disability-based discrimination. 42 U.S.C. § 12117(a). Under  
8 § 2000e-5, upon dismissing a charge of discrimination, the EEOC must notify the claimant and  
9 inform him that he has ninety days to bring a civil action. 42 U.S.C. § 2000e-5(f)(1). In the  
10 Ninth Circuit, this ninety-day period operates as a limitations period. *Payan v. Aramark Mgmt.*  
11 *Services Ltd. P’ship*, 495 F.3d 1119, 1121 (9th Cir. 2007) (citations omitted). Thus, if the  
12 claimant fails to bring suit within ninety days of receipt of the right to sue letter, his claims are  
13 time barred. *Id.* (citation omitted).

14 Nonetheless, for purposes of determining whether the limitations period has expired, the  
15 Ninth Circuit has adopted a “constructive filing” rule. For example, in *Loya v. Desert Sands*  
16 *Unified School District*, the court held, “[F]or purposes of the statute of limitations the district  
17 court should regard as ‘filed’ a complaint which arrives in the custody of the clerk within the  
18 statutory period but fails to conform with formal requirements of local rules.” 721 F.2d 729, 281  
19 (9th Cir. 1983). In so holding, the court relied on a Fifth Circuit decision which held that the  
20 standard for determining when a complaint was filed should be “whether the complaint ‘was ever  
21 in the actual or constructive possession of the clerk’ . . . .” *Id.* (quoting *Leggett v. Strickland*,  
22 F.2d 774, 776 (5th Cir. 1981)). Similarly, in *Cintron v. Union Pacific Railroad Company*, the  
23 Ninth Circuit held that the clerk’s rejection of the plaintiff’s complaint for failure to pay the  
24 correct filing fee should not act as a bar to the plaintiff’s claims because the clerk had  
25 constructive possession of the complaint. 813 F.2d 917, 920 (9th Cir. 1987).

26 Here, the court finds that Plaintiff “constructively filed” his complaint on December 5,  
27 2008, when he first lodged a copy of the complaint with a request to proceed in forma pauperis.  
28 Plaintiff’s renewed request to proceed in forma pauperis remedied the problem in his initial

1 application, and it appears that Plaintiff acted diligently in correcting his mistake. As Plaintiff  
2 initially acted within the statute of limitations, the court will not penalize him for making a  
3 renewed request to proceed in forma pauperis pursuant to a court order, which the court  
4 ultimately granted.

5 IT IS THEREFORE ORDERED that Vons' Motion to Dismiss (#11) is DENIED.

6 IT IS SO ORDERED.

7 DATED this 20<sup>th</sup> day of November, 2009.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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